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IN THE

Supreme Court of the United States

October Term, 1963

No. 65

VETERANS OF THE ABRAHAM LINCOLN BRIGADE,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

VETERANS OF THE ABRAHAM LINCOLN BRIGADE,
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v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Veterans of the Abraham Lincoln Brigade petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit (R. 59; Appendix B herein) which affirmed (Chief Judge Bazelon dissenting) an order of the Subversive Activities Control Board (R. 19) entered under Section 13(g)(1) of the Subversive Activities Control Act of 1950, 64 Stat. 1000, 50 U. S. C. § 792(g)(1) that the petitioner register as a Communist-front organization under Section 7 of the Act, 64 Stat. 993, 50 U. S. C. § 786.[1]

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[1] The Subversive Activities Control Act, as amended, is Title I of the Internal Security Act of 1950, 64 Stat. 987, and is hereafter referred to as the Act. The Subversive Activities Control Board is hereafter called the Board. "Tr." refers to the original transcript of record which has been filed with the Court in addition to the certified record ("R."). "P. Ex." refers to an Exhibit introduced at the Administrative hearing by the Attorney General; "Rep't" to the Board's report.

The Opinion Below

The opinion below (R. 23; Appendix A herein) has not yet been reported.

Jurisdiction

The judgment below was dated and entered on March 2, 1964 (R. 59). Jurisdiction of this Court is conferred by Section 14(a) of the Act, 64 Stat. 1001, 50 U. S. C. § 793, and 28 U. S. C. § 1254.

Questions Presented

1. Whether the organization satisfies the Act's first requirement that it be controlled by a Communist-action organization where, as the Court below found, petitioner's dominant managers were *not* representatives or functionaries of a "Communist-action organization" (*i.e.*, the Communist Party).

2. Whether the organization satisfies the Act's second requirement that it be "primarily operated for the purpose of giving aid and support to a Communist-action organization," where the organization engaged solely in peaceful activities for innocent objectives, including opposition to this very proceeding.

3. Whether the almost exclusive reliance of the Board and the Court below upon the pre-statutory activities of petitioner disregards that court's own strictures, violates the Act, and constitutes an ex post facto law and bill of attainder under Article I, Section 9 of the Constitution and denies due process under the Fifth Amendment thereof.

4. Whether the Board and the court below complied with the statutory mandate to (a) determine "the extent to which" the statutory criteria are established, and (b) make findings upon a preponderance of the evidence.

5. Whether a remand to the Board is required where the court below adopted standards and findings different from those of the Board.

6. Whether the provisions of the Act relating to the registration of Communist-front organizations are unconstitutional on their face and as applied to petitioner.

7. Whether the reliance by the court below upon a prior determination concerning the Communist Party in a proceeding to which petitioner was not a party is permissible under the Act and Constitution.

Statute Involved

The pertinent provisions of the Act are set forth in Appendix C herein.

Statement of the Case

This case and that of the *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board*, Oct. Term, 1963, No. 909, certiorari granted, April 27, 1964, are the first cases in this Court involving orders to register as Communist-front organizations.

The Act

Section 13 of the Act provides for administrative proceedings before the Board, instituted by petitions of the Attorney General, to determine whether accused organizations shall be ordered to register as "Communist-action" or "Communist-front" organizations.[2] On April 20, 1953,

[2] The Act also authorizes the Board to declare whether organizations are "Communist-infiltrated" organizations. Such organizations are deprived of the benefits of the National Labor Relations Act, but are not required to register. Sec. 13A, added by sec. 10 of the Communist Control Act of 1954, 50 U. S. C. 792a.

the Board ordered the Communist Party of the United States of America to register as a Communist-action organization (R. 5). That order was eventually sustained in *Communist Party* v. *S.A.C.B.*, 367 U. S. 1 (four Justices dissenting).

A Communist-front organization is defined by section 3(4) of the Act as one "which (A) is substantially directed, dominated or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title".[3]

Section 13(f) of the Act (as applied to this case) provides that in determining whether any organization meets this definition, the Board shall take into consideration the "extent to which":

> (1) persons who are active in the "management" of the organization are also "representatives of the Communist Action organization" (i.e. the Communist Party).
>
> (2) the organization's support is derived from the Communist Party.
>
> (3) the organization's resources are used to promote the objectives of the Communist Party.
>
> (4) the organization's positions do not "deviate from those of" the Communist Party.

The substantial sanctions imposed on a Communist-front and its members are set forth in Appendix C, have

[3] The references in section 3(4) to a Communist foreign government and the world Communist movement are not applicable here, since petitioner was found to be controlled by, and primarily operated for the purpose of giving aid to, the Communist Party, "a Communist-action organization" (R. 25).

been well-summarized in the petition in No. 909, and need not be detailed here. They include (a) the organization's registration with the Attorney General and an accounting of its funds and expenses and (b) a denial to its members of federal or labor union employment, American passports and their subjection to denaturalization and deportation proceedings.

The Petitioner

Petitioner is an unincorporated association consisting of Americans who fought in the Abraham Lincoln Brigade during the Spanish Civil War against fascism and Franco.[4] They formed the Veterans in December of 1939 for the purpose of continuing the friendships formed in Spain and of rehabilitating and resettling their colleagues. Petitioner gave them medical care, clothes and some money to tide them over until they could obtain employment. Petitioner assisted veterans in obtaining employment and housing and in the solution of other problems posed by an adjustment to civilian life. Petitioner also engaged in political activity, its main emphasis being on the continuation of opposition to the Franco regime in Spain (R. 25).

Petitioner's affairs have been run since 1949 almost entirely by Fishman, the Executive Secretary, aided by Milton Wolff, elected National Commander in 1939, who serves in a consultative capacity (Rep't 31-2). Fishman has also consulted other veterans who were still interested in petitioner's functions and operations (Tr. 3541-2, 4335-8, 4408). Petitioner has had no election or Executive Board meeting since 1949. Because of its failure to file required reports, its corporate charter was forfeited in 1952 (Pet. Exh. No. 260).

Petitioner's activities since 1949 have been quite meager and spasmodic. They consisted principally of social affairs,

[4] Tr. 481, 493, 582-8, 839, 974, 1048, 1163, 1436-40, 1477, 2149, 2175, 2229, 2430-1, 2585, 3022, 3048, 3203, 3214, 3436, 3511.

rehabilitation functions as described above, occasional statements in opposition to the Franco regime and some activity in support of its members who were indicted under the Smith Act (Tr. 3863-5, 3916-8), and more recently self-defense in this proceeding (Tr. 3866, 4348, 4383; R. 36).

The Administrative Proceeding

On April 22, 1953, the Attorney General instituted administrative proceedings before the Board by filing a petition for an order requiring petitioner to register as a Communist-front organization under Section 7(b) of the Act. On August 28, 1953, an amended petition was filed (R. 2). Hearings before the Board commenced on May 3, 1954 and ended on November 16, 1954 (Rep't p. 2). On December 21, 1955, the Board issued a registration order against petitioner (R. 19) and a report containing its findings and conclusions.

The report is significant because the Board's methods of determining the two statutory elements of control and purpose were so different from those of the Court below.

1. Thus the Board found that Messrs. Wolff and Fishman were petitioner's managers since 1950 (Rep't 30, 31) and that the latest evidence even of Communist Party *membership* was at least eight years prior to that date (Tr. 1945, 2002-16, 2640, 2703, 2753). There is "no direct specific evidence" that either was a Communist Party *representative*, said the Court (R. 34). Nevertheless, the Board held that the control component was proven by disregarding the statutory requirement that the Communist-front officer be a Communist Party functionary and that he have that status simultaneously with his control of the alleged front organization.[5]

---

[5] The Board employs the terms "member", "functionary", and "representative" interchangeably as though the three were equivalent (e.g. Rep't 25, 31, 33). It nowhere defines the terms "functionary" and "representative" and does not state the evidentiary basis for its conclusions. (See e.g. Rep't pp. 23, 25, 31.)

2. The evidence of purpose was almost exclusively of pre-statutory activities. The Board included in this category the activities of mere members although they were not acting for petitioner. It did not make the finding required by 13(f)(3) as to *the extent* to which petitioner's resources were used to promote Communist objectives. By relying upon these pre-statutory objectives, and by disregarding those admittedly innocent, the Board concluded that petitioner's current objectives were within the statutory ambit.

Proceedings in the Court Below

The Court below discarded the Board's entire approach as to time and control:

1. Time

> "This statute is cast in the present tense. It is not designed to produce historical treatises. It is designed to compel the public registration of organizations which, subsequent to the passage of the Act, operate to aid the aims of the Communist movement. This time element is not a technicality, or a happenstance, or a matter of semantics" (R. 27-28).

It noted as "almost startling" that "so little of the evidence" relates to 1950 or years thereafter (R. 32). Presumably, it agreed that the post-Act evidence was insufficient to justify the Board's order. However, the majority below stated that "the Board was entitled to view these events in the context of, or through the coloration of, the past" (R. 38). The Court did not note the Board's total disregard of the post-statutory events and that it had confined its report to the events of 1946 to 1950.

2. Control

The Court, disagreeing with the Board, held that control could be shown only if "in 1950 or thereafter the

dominant or key voices in the management of the Brigade" were "representatives or functionaries of the Party" (R. 30; see also R. 29). It found no evidence that these dominant voices, Wolff and Fishman, were functionaries or representatives of the Communist Party (R. 33).

Instead it turned to a letter of April 25, 1952 promoting an anthology of writings about the Spanish Civil War (R. 32). From this single ambiguous letter, the Court first drew the unsupported conclusion that all of the signatories were members of an executive committee, and then drew the further inference that "it is reasonable to assume that a small 'national committee' had duties relating to management" (R. 35). This, despite a clear record that in the 1950-54 period, there were no national committee or board meetings and that petitioner's affairs were run, as the Board found, entirely by Messrs. Wolff and Fishman (Tr. 3541-2, 4335-8, 4408)[6] (R. 32).

3. Purpose

The Court rejected petitioner's contention that the second half of the statutory definition of a Communist-front must be based on evidence that petitioner advanced the sinister objectives of the Communist Party which are recited in the Act (R. 37). It found no material dispute concerning the post-1950 activities of petitioner: (1) opposition to Fascism and Franco; (2) opposition to the Internal Security Act; (3) support of its members indicted under the Smith Act; and (4) self-defense (R. 36).

While the court recognized that these views "were also held by many people who were not even remotely allied with the Communist Party" (R. 37), it adopted a standard not used by the Board: "[w]hen a person, or an organi-

[6] Of the 11-man so-called National Committee (which had not met since 1949; R. 32), the court had found that only four could be characterized as Communist Party representatives (R. 34), but in no case later than 1949.

zation, actively presses objectives which are objectives of the Communist Party, does he or it do so as a matter of independent conviction, or does he do so by reason of substantial direction or control by the Communist Party and for the purpose of giving aid and support to the Party" (R. 37-38).

The court's approach appears to have been affected by the view of the Spanish Civil War as "a struggle between Fascism and Communism" (R. 24). It similarly treated the petitioner's contemporary objections to Franco as an aspect of "the bitter antagonism between the Communist movement and Franco" (R. 37). Neither the record in this case nor history generally can be said to support these judicial conclusions (R. 50, 52).

Chief Judge Bazelon, dissenting, agreed with petitioner that the statute requires proof that the alleged Communist-front is "advancing the sinister objectives of the world Communist movement" (R. 40) and that "the Board does not appear to have applied this standard" (*Ibid.*).

Further, the Chief Judge stated that "the staleness of the record requires us to remand the case to the Board for supplementary findings" (*Ibid.*). Citing the decision of the court below in *Labor Youth League* v. *Subversive Activities Control Board*, — U. S. App. D. C. —, 322 F. 2d 364 (1963), the Chief Judge pointed to "the age of the evidence at the time of the Board's hearings, and the lapse of eight years since the Board made its findings" (R. 41). He rejected the view "that the Board could view the rather meager evidence relating to the period 1950-1954 'through the coloration of the past'" (R. 41). He suggested a remand to the Board "for further hearings concerning the activities of the Brigade from the passage of the Act in 1950 to the present" (R. 42).

Reasons for Allowing the Writ

This case and the companion one, No. 909, present important statutory and constitutional problems never before this Court. The registration of Communist-front organizations obviously poses problems different from those relating to Communist-action organizations because of the different congressional findings in the statute, the latter's different treatment of the two types of organizations and the special status hitherto given by this Court to the Communist Party; see, *e.g. Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, 547. See also *Chafee, The Registration of "Communist-Front" Organizations in the Mundt-Nixon Bill*, 63 Harv. L. Rev. 1382.

Since even as to the Communist Party there has been a considerable difference of opinion, *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, the problems raised by petitioner are substantial. Indeed, so much so that the court below, "conscious of the fact that this case is important both to the public and to the individuals who are involved," took "an unusual step and invite[d] a petition for reconsideration" (R. 39).

1. Neither the court below nor the Board (with which it differed) followed either the *control* or the *purpose* parts of the statutory definition or correctly applied the criteria set forth by Congress in Section 13(f). The Board had erroneously found control established where alleged one-time Communist *members* thereafter became managers of petitioner. This erroneous standard was essential to the Board's finding of control since petitioner's two principal officers were not even *members* of the Communist Party after 1941, nine years prior to the passage of the Act.

While the court below enunciated the correct standard, namely, coincidental *representation* of (not membership in) the two organizations, it misapplied the standard. It turned from the only proper test, an analysis of petitioners' man-

agers, Messrs. Fishman and Wolff, to a mere promotional letter, the status and functions of whose signatories is a matter of unsupported inference.

2. Nor was the second element, that of purpose, made out where, as here, the organization engaged exclusively in peaceful activities for innocent objectives. The court described petitioner's activities as "vigorous and vehement opposition to Fascism and particularly to Franco, outspoken opposition to the Internal Security Act and all similar legislation, vigorous support of its indicted members, particularly Nelson, and efforts to defend itself" (R. 36). For statutory and constitutional reasons (*infra*, p. 13), these activities must be deemed outside the statutory ambit, particularly where "this position on these subjects was also held by many people who were not even remotely allied with the Communist Party" (R. 37).

Opposition to Fascism and Franco has been the consistent position of the majority of the American people. Opposition to the Internal Security Act cannot be translated into coverage by the Act. The distinguished opponents of the Act are too many to require citation (see also the Veto Message, H. R. Doc. 708, 81st Cong. 2d Sess.). Nor can the legal defense of one's members prosecuted under sedition laws be proof of such coverage. This defense, viewed critically by the court below, was successful in this and other courts, *Pennsylvania* v. *Nelson*, 350 U. S. 497; *Mesarosh* v. *United States*, 352 U. S. 1; *Wellman* v. *United States*, 253 F. 2d 601.

3. The court, despite its strictures, relied like the Board, upon the pre-1950 activities of petitioner and not the post-statutory ones. See Judge Bazelon's dissenting opinion (R. 40-42).

Reliance upon the past as such rather than as background for an evaluation for contemporaneous events is in direct violation of the congressional objective to require registration of organizations which *are* presently controlled

by the Communist Party to achieve Communist objectives. Any other construction raises serious questions of due process and would turn the statute into a bill of attainder and an ex post facto law, Constitution, Article I, Section 9, clause 3.

4. The court below failed to correct the Board's basic error in substituting "whether" for "extent to which" in each of the four criteria. In the court below, petitioner had pointed out, *e.g.*, that the Board had failed to weigh the so-called Communist Party support against the far more substantial support from Secretary of the Interior Ickes, Vincent Sheehan and others. The Senate debate on this bill deliberately showed the intention of the Congress to consider this measure of extent. Senator Ferguson, one of the drafters of the Senate bill, stated: "It was our considered opinion and conclusion that the words 'whether or not' were an absolute and took no recognition of degree" hence "advisedly adopted the phrase 'the extent to which'," 96 Cong. Rec. 14534.

The court below also disregarded the fact that the Act places a greater burden on the Board than the normal substantial evidence rule applicable to administrative agencies. See, *e.g.*, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian E. & S. Company*, 306 U. S. 292, 300. Instead, Section 14 of the Act requires findings to be based upon a preponderance of the evidence. This requirement was avowedly inserted by the proponents to protect an organization against the serious consequences of unfair labelling, 94 Cong. Rec. 6136-7; 96 *Id.* 13765, 14531, 15427. The court's opinion makes no attempt to weigh the evidence on this special statutory scale.

5. The opinion of the Board and the court below are irreconcilable. Thus, *e.g.*, (1) they differ on the meaning of the control component of the statute, *supra*, page 7; (2) the Board found that petitioner's leaders were Party repre-

sentatives, and the court, disagreeing, inferred erroneously that petitioner had an Executive Committee which must have had managerial functions; (3) the court's motivation test for those who promote innocent objectives finds no inspiration in the Board's opinion.

At the very least this case should be remanded to the Board to re-examine the case free from its erroneous findings and in the light of principles enunciated for the first time by the court below, *Securities Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *Burlington Truck Lines* v. *United States*, 376 U. S. 156.

6. The court's construction of the statute and its application to petitioner raises serious constitutional questions under the First and Fifth Amendments. The conclusion that the petitioner's post-statutory activities, although lawful and "held by many people who are not even remotely allied with the Communist Party" (R. 37) are within the ambit of the statute, creates an untenable subjective test of motivation.

In *Communist Party* v. *Subversive Activities Control Board, supra*, this Court upheld the constitutionality of the Act requiring the Communist Party to register as a Communist-action organization. This Court recognized that the imposition of the registration requirement on an organization or individual as a precondition to the exercise of the First Amendment rights of speech and assembly impairs those rights (p. 89). See also *Thomas* v. *Collins*, 323 U. S. 516; *Talley* v. *California*, 362 U. S. 60. Applying the balancing doctrine, *cf. National Assoc. for Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479, this Court upheld the registration of an organization found dominated by a foreign power whose objective is the forcible overthrow of the government, 367 U. S. 1, 104-105.

The fair implication of the majority opinion in the *Communist Party* case is that the registration requirement may be constitutionally imposed only upon "foreign dominated organizations which work primarily to advance the objectives of a world movement controlled by the government of a foreign country" and not upon an organization, like the petitioner, whose activities and purposes are quite laudable. This Court's conclusion is supported by the congressional findings in Section 2(7) that Communist-front organizations are utilized "in carrying on the activities" described in Section 2(6) which, in turn, recites the sinister "objectives" of the world Communist movement. (See also H. Rept. No. 2980, 81st Cong. 2d Sess., p. 3.) It is also supported by the Congressional directive that "[n]othing in this chapter * * * shall be construed to authorize * * * censorship or in any way limit or infringe upon freedom of the press or of speech * * *".

Hence, the registration provisions must be construed to apply to organizations of the character described by the majority of this Court in the *Communist Party* case. Nothing in the record suggests that petitioner was utilized to bring about the overthrow of the government or to establish a totalitarian dictatorship subservient to the Soviet Union.

The decision below holds that petitioner's laudatory objectives can constitutionally be regulated because of an inference that it desired to aid the Communist Party. This gives the definition of a Communist-front organization such vagueness as to deny due process; see *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 286.

Petitioner's right to defend its own members against unlawful prosecutions is at least as great as the right upheld by this Court in *National Assoc. for Advancement of Colored People* v. *Button*, 371 U. S. 415, 428-30. Petitioner's activities are protected by the First Amendment and are not subject to governmental control and regulation

even if it had been associated with Communists in these endeavors, *DeJonge* v. *Oregon*, 299 U. S. 353. To require the present registration of petitioner on the ground that its members fought in the Spanish Civil War in 1936-38, which the court below believes to be a conflict between Communism and Fascism, and on the basis of pre-statutory activities, the continuance of which could hardly be presumed in view of the record, the passage of time and the impact of the statute, is to offend due process and to turn the statute into a bill of attainder and an ex post facto law.

These constitutional questions can be resolved in petitioner's favor without a reversal of this Court's decision in the *Communist Party* case. However, post-decision events have shown the need for reconsideration of certain of the principles enunciated in that case. One is this Court's direction of registration even though, in the subsequent enforcement proceeding, registration is barred by the constitutional privilege. *Communist Party of the United States of America* v. *United States of America*, U. S. App. D. C. No. 17583. The second is this Court's refusal to review the sanctions imposed upon an organization's members. This refusal disregards the fact that registration immediately makes those sanctions effective by making it unlawful, *e.g.*, to apply for a passport, and that to seek a judicial determination of constitutionality risks criminal prosecution. *Cf. Rabinowitz* v. *Kennedy*, O. T. 1963, No. 287, 32 U. S. L. W. 4264.

7. Finally, this case presents the same defect as that in No. 909; the Board's prior determination that the Party was a Communist-action organization was made "binding and conclusive" upon the petitioner (Rep't 117). Such a finding has no statutory basis and is constitutionally impermissible since petitioner was not a party to the *Communist Party* case; see *Hansberry* v. *Lee*, 311 U. S. 32; *Kirby* v. *United States*, 174 U. S. 47. Peti-

tioner and its members are thus deprived of liberty and property without the opportunity to contest the factual premises upon which the validity of deprivation depends, *Noto* v. *United States*, 367 U. S. 290; *Renaud* v. *Abbott*, 116 U. S. 277, 278.

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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May 4, 1964.

APPENDIX A

Opinion Below

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13174

VETERANS OF THE ABRAHAM LINCOLN BRIGADE,
PETITIONER

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, RESPONDENT

On Petition for Review of Order of the Subversive Activities Control Board

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Decided December 17, 1963

Mr. Leonard B. Boudin, with whom *Mr. David Rein* was on the brief, for petitioner.

Mr. Robert L. Keuch, Attorney, Department of Justice, with whom *Mr. Frank R. Hunter, Jr.*, General Counsel, Subversive Activities Control Board, *Messrs. Kevin T. Maroney* and *George B. Searls* and *Mrs. Lee B. Anderson*, Attorneys, Department of Justice, and *Messrs. Charles F. Dirlam* and *Peter P. Hanagan*, Attorneys, Subversive Activities Control Board, were on the brief, for respondent.

Mr. Edward J. Ennis filed a brief on behalf of American Civil Liberties Union, as *amicus curiae*.

Before BAZELON, Chief Judge, PRETTYMAN, Senior Circuit Judge, and DANAHER, Circuit Judge.

PRETTYMAN, *Senior Circuit Judge*: This case is another in the series of Communist-front cases which had been pending before the court awaiting the outcome of the *Communist Party* case.[1] The statute[2] and its application were discussed in No. 12642, *Labor Youth League* v. *Subversive Activities Control Board*, decided April 25, 1963,[3] and in No. 13260, *National Council of American-Soviet Friendship* v. *Subversive Activities Control Board*, decided May 16, 1963.[4]

The petitioner organization[5] is composed of former members of a fighting force called the Abraham Lincoln Brigade, a unit of approximately three thousand men who went in groups from this country to Spain during the late 1930's to fight on the side of the Republican Army, sometimes called the Loyalists, in that country's Civil War. That war took on an international image as a struggle between Fascism and Communism. The outcome is a matter of history. The Subversive Activities Control Board found that the Lincoln Brigade was one of several international brigades, from various countries, organized by the Communist Party pursuant to directive from the Communist International in Moscow, to advance the Soviet cause in Spain. According to the Board, of the three thousand men who went from this country, eighteen hun-

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[1] Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961).

[2] Tit. I, Internal Security Act of 1950, 64 STAT. 987, 989, as amended, 50 U.S.C. § 782(4).

[3] —— U.S.App.D.C. ——, 322 F.2d 364.

[4] —— U.S.App.D.C. ——, 322 F.2d 375.

[5] Sometimes referred to in this litigation as VALB or the Brigade.

dred returned and less than six hundred survived at the time of the Board's report. The Board found that many, but not all, of the returning veterans were organized into the petitioner organization, under the direction and control of the Party, and that it has been, and was at the time of the report, a Communist-front organization, being dominated by the Communist Party and rendering substantial aid and support to it.

The organization itself, petitioner herein, admits in its brief that it was organized around the time of the return of the American participants in the Spanish Civil War. It claims that its functions included "the fostering and continuation of the friendships and fellowships formed in Spain and the rehabilitation and resettlement of the veterans who had returned from Spain." It further states:

> "Many of the men who returned were in need of medical care, in some cases of an extended nature involving operations and hospitalization. The petitioner provided this care to its members without charge. All of the returning veterans were given clothes and some money to tide them over until they could obtain employment. The petitioner assisted veterans in obtaining employment, places to live and in the solution of other problems posed by the adjustment to civilian life. The petitioner also engaged in political activity with its main emphasis on the continuation of opposition to the Franco regime in Spain."

Petitioner also claims that activity in recent years has been meager and spasmodic, consisting of social affairs, rehabilitation functions, "occasional statements in opposition to the Franco regime and some activity in support of its members who were indicted under the Smith Act".

The Board hearing was held in late 1954, and its report was issued December 21, 1955. After the Supreme Court had disposed of the *Communist Party* case, *supra*, oral argument was had in this court in October of last year (1962).

I

The ultimate conclusion of the Board which we are asked to set aside is that this organization is a Communist front and therefore must register with the Attorney General.

Section 3 of the statute defines a Communist-front organization as:

> "[A]ny organization in the United States • • • which (A) is substantially directed, dominated, or controlled by a Communist-action organization, *and* (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement • • •." (Emphasis added.)

Thus the statutory definition has two parts, one relating to the direction or control of the subject organization and the other relating to its purposes. A Communist front is directed, dominated or controlled by a Communist-action organization (in this case the Communist Party), and its primary purpose is to aid and support the Party. This is the statutory definition, and so this was what the Attorney General undertook to establish before the Board.

In another section of the statute (Sec. 13(f)) the Congress directed the Board as to what it must—"shall"—take into consideration in determining whether an organization is a Communist front. It listed four such subjects, which have come to be called "criteria" in these cases. The intended relationship between the statutory definition and these criteria is not altogether clear. But it is clear that to declare an organization a Communist front the Board must find it to meet the statutory definition. And further it is clear that in the process of reaching that conclusion the Board must "take into consideration the extent to which" the organization has four specified features.

The four statutory criteria are:

"(1) the extent to which persons who are active

in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement * * *; and

"(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement * * *; and

"(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement * * *; and

"(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement * * *."

The Board found on the record before it the presence of specific and detailed evidence as to each of these criteria and concluded, on the "overwhelming weight of the evidence", that the Brigade is "directed, dominated, and controlled by the Communist Party of the United States —a Communist-action organization—and * * * is primarily operated for the purpose of giving aid and support to it and the world Communist movement."

II

Before entering upon a review of the Board's findings in this case, we interject here, as we did in the *National Council of American-Soviet Friendship* case, *supra*, a comment upon the importance of the time element in the statutory terms involved. This statute is cast in the present tense. It is not designed to produce historical treatises. It is designed to compel the public registration of organizations which, subsequent to the passage of the Act,

operate to aid the aims of the Communist movement. This time element is not a technicality, or a happenstance, or a matter of semantics. It is a basic concept. The 1930's, '40's and '50's, *i.e.*, the years before, during and after World War II, witnessed three different policy periods in the relationships between the Soviet Union and the United States. We were for a while neutral in the conflicts in Europe; then we were allies with the Communists against the Nazis; and then, in the presence of rapidly developing historical events, the Congress in 1950 declared the Communist movement to be a revolutionary movement designed to establish a Communist totalitarian dictatorship in all countries in the world. The Congress found and declared in that Act that the foreign Communist dictatorship establishes and utilizes in other countries action organizations which are sections of the Communist movement and are controlled and directed by the foreign dictatorship.[6] And it further declared in that same Act that "those individuals who knowingly and willfully participate in the world Communist movement • • • in effect repudiate their allegiance to the United States".[7] To expose to public knowledge these organizations and these individuals was the prime purpose of this statute.

Thus it is that in determining whether a certain organization should be required to register the Board must determine its nature in the 1950's or thereafter. Its prior history may of course be valuable evidential material, but the finding must be as of the time of hearing or reasonably close to it—at the earliest as of the time of the passage of the Act or subsequent thereto.

III

Again preliminarily, we note one more feature of the

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[6] 50 U.S.C. § 781(5).

[7] *Id.* § 781(9).

statute. We noted it in the *National Council* case, *supra*. We note it again. A Communist-front organization must be, as the Government points out in the cases we have thus far considered, directed, dominated and controlled *"by the Communist Party,"* not by mere members of that entity. That this specification is material is demonstrated by a comparison between the definitions of a Communist-front organization and a Communist-infiltrated organization. We have recited the former, *supra*. As to the latter the statute states:

> "The term 'Communist-infiltrated organization' means any organization in the United States • • • which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement • • •."[8]

In short, a Communist-front organization is controlled by the Communist Party; a Communist-infiltrated organization is controlled *not* by the Party but by an individual or individuals who render "aid or support" to the Party.

This conclusion is high-lighted by a reading of the first or "control" criterion of consideration specified by the statute as to each of these organizations. As we have noted, in the Communist-front proceedings the Board must consider:

> "(1) the extent to which persons who are active in its [*i.e.*, the organization involved] management, direction, or supervision, • • • are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization [in this case the Party] • • •."

On the other hand, with reference to Communist-infiltrated organizations, the Board must consider:

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[8] Sec. 7(a), Communist Control Act of 1954, 66 STAT. 777, 50 U.S.C. § 782(4A).

> "(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within three years have been, (A) members, agents, or representatives of *any* Communist *organization*, • • • or (B) engaged in giving aid or support to any such organization • • •." (Emphasis supplied.)[9]

We will not construe the meaning of the Communist-infiltrated criterion until there is a case which calls on us to do so. We point to the language of that criterion as an aid in the construction of the meaning of the criterion used in connection with Communist fronts.[10]

A front must be controlled by the Party. This is the first requirement of the statutory definition; *i.e.*, (A) of the defining sentence. How does the Party act? The answer, it seems to us, is found in the first of the criteria specified for Board consideration. That is to say, the Party acts through persons who are "active in [its] management, direction, or supervision, or • • • as [its] representatives". Obviously a representative is one authorized.

So the inquiries in this case upon the first half of the statutory definition are (1) whether persons active in the management, direction or supervision of the Brigade in 1950 or thereafter were authorized to do so by the Party; and (2) whether these persons were the dominant or key voices in the management of the Brigade.

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[9] 50 U.S.C. § 792a(e)(1).

[10] We note that, whereas the Communist-front criterion is cast in the present tense, that is, "are active", the Communist-infiltrated provision appears in the alternative, that is, "are, or within three years have been". Moreover in the case of a Communist-infiltrated organization the representative need not be of an action organization but may be of any Communist organization, *i.e.*, not only an action organization but of a front or another infiltrated organization.

IV

The evidence and the findings in this record[11] contain voluminous data concerning the organization of the Brigade and its participation in the Spanish Civil War, which began in July, 1936, and continued until March, 1939. It is clear that the struggle between the Republican government and the rebel forces was basically between Fascism (led by Franco and the Spanish Fascist Party) and Communism (supporting the Republican government). The Brigade tells us in its brief that the only substantial military supplies received by the Republican government came from the Soviet Union and, to a much less extent, from Mexico. It tells us further that the Communist Party, among others, rallied its members to join the Republican Army; that volunteers throughout the world joined that Army; that the American volunteers became known as the Abraham Lincoln Brigade; and that Communists in the United States played a large part in recruiting the members. There is a dispute as to the control and supervision of these Brigades while in Spain, whether it was by the Comintern or independently by the Spanish government. And there is a dispute as to the number of "Communists" in the Brigade and the number who were killed and how many returned. The Brigade says twelve hundred of the American volunteers returned; the Board says eighteen hundred.

All the foregoing is interesting. It is also important, but only in so far as background material may shed light on later events. It is clear that from among the surviving returnees came the present members of the Brigade. The Brigade was organized in 1939, and in 1940 it was incorporated in New York as a membership corporation.

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[11] The record contains 4576 pages of testimony, 306 exhibits, and 123 single-spaced, mimeographed pages of Report.

In addition to the national organization it had local posts in some cities. Two Government witnesses testified that they were present at meetings, one of the Politburo and the other of a Central Committee of the Party, when directives were issued to organize, direct and control the Brigade and reports on its progress were made. One of these witnesses testified, based upon official reports made in his presence at meetings of the Politburo and National Committee of the Party, that the principal objective and major purpose of the Brigade were as an integral part of the Party apparatus. Milton Wolff, the last battalion commander of the group in Spain, was elected National Commander of the Brigade at its first national convention, and he has held that post until the present time. Because of failure to file required reports, the corporate charter under New York law was forfeited October 15, 1962. The Brigade says its national executive board has not met or functioned in any way since 1949. That position is contradicted in some degree by a letter mailed to Brigade members under date of April 25, 1952, signed "Fraternally yours, for the National Committee of the Veterans of the Abraham Lincoln Brigade," followed by the signatures of Wolff, Fishman, and nine others.

The Board made a finding that "Respondent has operated for the past five years into the present through two principal active officers, Moe Fishman, Executive Secretary, and Milton Wolff, National Commander." It also found that "In 1952, respondent's nine-member Executive Committee included six Party members, namely, Irving Weissman, Steve Nelson, Harold Smith, Vaughn Love, Daniel Groden, and Alvah Bessie."

We have diligently searched the record references given us. Almost startling is the fact that so little of the evidence relates to 1950 or years thereafter. Of the thirteen Government witnesses who had been members of the Party, either bona fide or as undercover agents, all but

three left the Party before 1950.[12] Of these three Blauvelt was expelled in November, 1951, but her testimony related to Steve Nelson in 1946. Matusow has already been discredited as a witness in these cases.[13] Lautner left the Party in 1950. All of these thirteen witnesses testified to events occurring while they were Party members. The evidence as to post-1950 is principally documentary.

The Board repeatedly refers to the officers (Wolff and Fishman) and to the six members of the Executive Committee (whom we have mentioned) as "functionaries" of the Party. In the *National Council* case, *supra*, we quoted the Government witness Clontz's definition of that term. On the present record the witness Lautner defined it. He said that "a Party functionary is a member of the Communist Party who has a specific assignment from the Party. * * * is a dedicated person who subjugates his own personal desires and problems, to that of the discipline of the Party. * * * will go wherever the Party sends him and do whatever the Party demands of him, and completely subjugates himself to Party discipline." The evidence does not show, so far as we can find, that Wolff or Fishman were functionaries within that definition, or that they held any official positions in the Party, or that they were picked by the Party. They were members of the Party, and a witness (Budenz) testified that Wolff made reports concerning the Brigade to the Politburo prior to 1945. Of the six above-named Executive Committee members, Weissman was a Party organizer in West Virginia

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[12] Blauvelt in 1951, Budenz in 1945, Gladnick in 1939, Harris in 1948, Hecht in 1939, Herrick in 1939, Horan in 1939, Horvath in 1947, Huber in 1947, Lautner in 1950, Maken in 1939, Matusow in 1951, and Romerstein in 1949.

[13] See Communist Party of U. S. v. Subversive Act. Con. Bd., 102 U.S. App. D.C. 395, 399, 254 F.2d 314, 318 (1958).

in 1949. Nelson was variously identified as having been a section organizer for the Party, a member of the National Committee, and as having an office at Party headquarters. Harold Smith had been Earl Browder's bodyguard and secretary and remained loyal to him when he was expelled from the Party. One witness said Vaughn Love was a political commissar in Spain in 1938 and had instructed him to join the Communist Party of Spain. A witness said that Groden had been instrumental in bringing about the expulsion of two friends of his (the witness's) from the Party. The same witness said, "Danny Groden I believe was an organizer." Bessie was an editor on the *New Masses,* and the Party secured for him a position as a writer in Hollywood. Bessie joined in an attack by the Party on Hemingway's book, *For Whom The Bell Tolls.*

We think the reasonable inferences from the evidence are such that it can properly be concluded that a preponderance of that evidence establishes these eight men to have been members of the Party. But, as we have said, we find no direct, specific evidence that Wolff and Fishman, the two found by the Board to have been the "two principal active officers" of the Brigade during the five years prior to the Board's hearing, were in those positions as representatives of the Party. As we have said, we find no evidence that they were selected by the Party. Wolff was elected at a Brigade Convention, and he testified that he personally picked Fishman. The representative capacity, if any, of these two must be inferred from the fact that they made reports to the Politburo concerning the Brigade.

We think it is reasonable to conclude from the evidence we have very briefly summarized that Nelson, Weissman, Smith and Love were Party "functionaries". There is evidence that Nelson was designated by the Politburo as "liaison" man with the Brigade. But the part of these

men in the management or control of the Brigade must be inferred from the fact that they were members of the National Committee. The duties of that Committee are not shown by direct evidence. But absent contrary evidence it is reasonable to assume that a small "National Committee" had duties relating to management.

V

In this posture of our consideration we turn to the three other criteria. Because it seems to us that, although the language of the first two criteria (one directly and the other indirectly) relate to management and control and the other two relate to objectives and policies, it was not intended that the four criteria be split into two separate parts, one applicable to the first half (clause (A)) of the statutory definition and the other applicable to the second half (clause (B)). The statute itself does not indicate such a dichotomy of the criteria. We think the Board must "take into consideration" all four of these specifications in determining the applicability of the whole of the statutory definition.

By these other three criteria (Sec. 13(f) of the Act) the Board is directed to consider the extent to which (1) the support of the Brigade is derived from the Party, (2) its funds, resources or personnel are used to further the objectives of the Party, and (3) the positions taken by it on policies do not deviate from those of the Party. The record is replete with evidence of a close relationship between the Party and the Brigade, the activities of Brigade members in Party affairs, support of each of these organizations by the other, promotions of Brigade members within the Party, support of the Party by the publication of the Brigade, *Volunteer for Liberty*, and like support of the Brigade by the Party newspaper, *The Daily Worker*, and the similarity of positions taken by the two organizations on many matters of policy—all in the

years up to 1950. But the acute question, as we have indicated, concerns the years immediately prior to the Board hearing (1954), specifically since the passage of the Act (September, 1950). The Brigade says in its brief to us that since the latter date its activities have consisted of social affairs, statements in opposition to the Franco regime, the rehabilitation of Brigade members in need of aid, support of its members indicted under the Smith Act, particularly Nelson and Weissman, and defense of itself in the present proceeding. The report of the Board does not materially contradict this factual position. It finds, and supports with numerous record references, besides a few unimportant incidents,[14] vigorous and vehement opposition to Fascism and particularly to Franco, outspoken opposition to the Internal Security Act and all similar legislation, vigorous support of its indicted members, particularly Nelson, and efforts to defend itself.

Copies of *Volunteer for Liberty*, the publication of the Brigade, in the record as exhibits, include thirteen issues from September 7, 1951 (Volume 12, No. 8) to June, 1954 (Volume 15, No. 4). These are mimeographed sheets, running from one to six pages per issue, very informal and quite vigorous. They constitute original and documentary indications of the activities of the Brigade. They were written at the time by officers of the Brigade, addressed to the members of the Brigade concerning the activities and interests of the Brigade.

The principal interest reflected by these documents is, as the Brigade says, the defense of Steve Nelson, and to a less extent of Irving Weissman. Numerous appeals for

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[14] Such as a birthday meeting in Los Angeles, a tribute to Stalin, a protest against a visit by a Falangist Dance Group and by the Mayor of Madrid, and the publication of a book on the Spanish Civil War.

funds for these purposes were made. The prosecutors, jurors and judges were vigorously assailed. Frame-ups were charged. Next in importance appears the Brigade's antagonism to Franco. The Truman administration was charged with all sorts of misdoing in its relations with Franco. Continuous attacks on the Internal Security Act, Senator McCarran, the Un-American Activities Committee, the Wall Street imperialists, and all war-mongers appear in these issues. The publication demanded cessation of the Korean War. These were clearly the principal aims of the Brigade in the post-1950 years as reflected by its official communications to its members.

All the activities just listed were aims and purposes of the Communist Party. Steve Nelson was indicted under the Smith Act as a member of the Communist Party. The allegations were that he was a member of the Party and that the Party taught the overthrow of the Government by force. These indictments were of vital importance to the Party. The Pennsylvania indictment was based upon the same allegations. It became a cause celebre.[15] The bitter antagonism between the Communist movement and Franco is history. Spain is a mother country to most of Latin America. The military bases sought by the United States in Spain were designed as part of protective measures against Communist aggression. The Internal Security Act was aimed at the Communist movement and its agencies. The Korean War was an action by the United Nations to contain Communist advances.

It is true, as the Brigade argues, that these positions on these subjects were also held by many people who were not even remotely allied with the Communist Party. So the question is: When a person, or an organization, actively presses objectives which are objectives of the

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[15] Pennsylvania v. Nelson, 350 U.S. 497 (1956).

Communist Party, does he or it do so as a matter of independent conviction, or does he do so by reason of substantial direction or control by the Communist Party and for the purpose of giving aid and support to the Party? This is a question of fact, the answer to which is to be derived from the record.

We think the Board was entitled to view these events in the context of, or through the coloration of, the past. The events in 1950-1954 were not factually isolated. The Brigade continued to operate after 1950. It had the same officers and occupied the same offices. It continued to publish its magazine. The character and tone of its declarations upon the subjects with which it dealt were the same as those it had always utilized. So that factually, on this record, the post-1950 activities and policies appear as a continued, although diminished, stream, rather than as a separate, new phase of life. Thus viewed, in the light of all that had gone before, considering the extent to which the management of the Brigade was dominated by representatives of the Party, and the extent to which it supported the Party and the Party supported it, and its policies conformed to the policies of the Party, we think the Board was justified in concluding that upon the record as a whole a preponderance of the evidence establishes that the Brigade was, in the years immediately prior to the hearing, substantially dominated, directed or controlled by representatives of the Party, and operated primarily to aid and support the Party. A re-reading of our discussion of the evidence will demonstrate the point. We need not repeat that discussion. We add that the language and tone of *Volunteer for Liberty* support that view.

The Brigade says its primary purposes were the perpetuation of battlefield-born comradery and the assistance of veterans in need. If so, *Volunteer for Liberty* does not reflect it for 1950-54. That paper does carry

announcements of mass meetings, a "soiree", and "encampment", a New Year's Eve Ball, and other similar events, but in almost all instances these gatherings were for other purposes, principally for the defense of Steve Nelson and in opposition to Franco and this proceeding. Admission was charged and collections taken up. Impassioned pleas for causes were made.

We are conscious of the fact that this case is important both to the public and to the individuals who are involved. We are also conscious of the tremendous volume of the record of this evidence, the almost numberless facets of fact involved, and the dozens of record references given us. All the findings are under vigorous attack. For these reasons we take an unusual step and invite a petition for reconsideration. If either party, or both parties, feels or feel that we have overlooked evidence relating to post-1950 events or activities, it or they may file, on or before thirty days from the date of our order, a petition referring specifically to such evidence and giving its record references.

VI

The Brigade argues that, although the Supreme Court held Section 7 of the Act (the registration requirement) to be constitutional[16] when applied to a Communist-action organization, the reasons given are not applicable to a Communist-front organization; and that as to the latter Section 7 is invalid. The argument is that the conclusion of the Court was premised upon the congressional findings concerning the world Communist movement, its purposes, and its methods of operation (Secs. 3(3) and 2(4)); and that there is nothing in this record to support a finding that the Brigade was foreign-controlled and operated or was utilized to bring about the overthrow of the gov-

[16] Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 81 *et seq.*

ernment or the establishment here of a totalitarian dictatorship. But we think the Supreme Court's opinion is not so narrowly based. The purposes of the Act, said the Court, are expressed in Section 2 and the registration section is not "lacking in consonance" with those provisions. Section 2 of the Act, in subparagraph (7), recites that Communist organizations "operate to a substantial extent through organizations commonly known as 'Communist fronts' ". So, as a matter of statutory constitutionality, we are of opinion that the conclusions reached by the Court in the cited case apply here. The discussion of the subject by the Court is too long to repeat. A reading of the whole of it will demonstrate its applicability to Communist fronts.

For the purpose of making effective our permission for the filing of a petition for reconsideration, issuance of the mandate of this court will be withheld for thirty days. With this proviso the order of the Board is

Affirmed.

BAZELON, *Chief Judge,* dissenting: In *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board,* —— U.S.App.D.C. ——, ——.F.2d —— (1963), decided today, I have explained why I think the statutory definition of a Communist front should be read to include only organizations "primarily operated for the purpose of giving aid and support to a Communist-action organization" in advancing the sinister objectives of the world Communist movement. Here, as in that case, the Board does not appear to have applied this standard. I do not consider whether the evidence would support a finding of sinister purpose, because in my view the staleness of the record requires us to remand the case to the Board for supplementary findings.

In *Labor Youth League* v. *Subversive Activities Control Board*, —— U.S.App.D.C. ——, 322 F.2d 364 (1963), we noted that the serious consequences of registration to an organization and its past and present members demand strict adherence to the requirement that proof of its status be timely. There the problem was mootness. Here it is the age of the evidence at the time of the Board's hearings, and the lapse of eight years since the Board made its findings.

The hearings were held in 1954 and much of the evidence dated back to the late 1930's and the early 1940's. As the court points out, our relations with the Soviet Union have shifted radically in the meantime. And the Republican cause in the Spanish Civil War engaged the loyalties of sincere democrats as well as Communists.

Despite the court's warning against reliance on old evidence, it concludes that the Board could view the rather meager evidence relating to the period 1950-1954 "through the coloration of the past." I cannot agree.

As an example of what this court now approves, I refer to the Board's finding that officers or functionaries of the Communist Party controlled the Brigade in 1952. The Board included in this category the Brigade's two officers, Wolff and Fishman, and six of the nine members of its Executive Committee. The court recognizes that the preponderance of the evidence fails to show that either of the two Brigade officers, as well as two of the six Executive Committee members, were officers or functionaries of the Party at any time. This leaves only Nelson, Weisman, Smith and Love. But as to these four of the eleven top officials of the Brigade in 1952, the court ignores the age of the evidence that they were Party functionaries. The most recent evidence on any of the four concerns Weisman, said to be a Party organizer in 1949, and Nelson, on whom the evidence dates from 1946. The finding on Love is based on testimony given by Horan,

who left the Party in 1939, concerning Love's activities in Spain in 1938. The evidence about Harold Smith goes back to 1946, when Earl Browder was expelled from the Party and Smith, his bodyguard, remained loyal to him. Continued loyalty to a man who had been expelled in 1946 does not support an inference that Smith was a Party functionary in 1952.

The record was stale when the Board made its findings. In the eight years since then there have been turbulent changes in world affairs. Though American-Soviet relations have not changed as radically in this period as before, the views of many who were formerly sympathetic to the Communist cause have undergone profound change, particularly after the brutal suppression of the Hungarian revolt in 1956.

I would remand to the Board for further hearings concerning the activities of the Brigade from the passage of the Act in 1950 to the present.

APPENDIX B

The Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 13,174

VETERANS OF THE ABRAHAM LINCOLN BRIGADE,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Petition for Review of Order of the Subversive Activities Control Board.

Before:
BAZELON, *Chief Judge*, PRETTYMAN, *Senior Circuit Judge* and DANAHER, *Circuit Judge*.

JUDGMENT

This case came on to be heard on the record from the Subversive Activities Control Board, and was argued by counsel; and this court having filed an opinion in this case on December 17, 1963, providing that entry of judgment be withheld for 30 days; and it appearing that this court entered an order on February 17, 1964, denying petitioner's petition for reconsideration; upon consideration whereof, it is

ORDERED AND ADJUDGED by this court that the order of the Subversive Activities Control Board on review in this case is hereby affirmed.

PRETTYMAN,
Per Senior Circuit Judge.

Dated: Mar 2—1964

Separate dissenting opinion by Chief Judge Bazelon was filed December 17, 1963.

APPENDIX C

Statute Involved

Pertinent provisions of the Subversive Activities Control Act of 1950 (which is Title I of the Internal Security Act of 1950), as amended, 64 Stat. 987, 50 U.S.C. 781, et seq., are as follows. (The Act's section numbers are followed by the appropriate section numbers of 50 U.S.C. in brackets.)

Sec. 1(b) [798]. Preservation of certain rights.

Nothing in this chapter * * * shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated under said subchapter and sections having that effect. Sept. 23, 1950, Title I, § 1(b), 64 Stat. 787.

Sec. 2 [781]. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative

form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorshiip of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of the world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic

processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6) of this section, such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts," which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts."

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of Communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the es-

tablishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of Communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organ-

izations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Sec. 3 [782]. For the purposes of this title—

* * * * *

(2) The term "organization" means an organization, corporation, company, partnership, association, trust, foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph

which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

* * * * *

Sec. 5 [784]. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any non-elective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any non-elective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under the Act.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization;

* * * * *

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby . . .

Sec. 6 [785]. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

* * * * *

Sec. [786].

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(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

* * * * *

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and the last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

* * * * *

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraphs (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f) (1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

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Sec. 9 [788]. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

* * * * *

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection . . .

* * * * *

Sec. 10 [789]. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization, or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations

prescribed by the Attorney General, with the name or the organization appearing in lieu of the blank: "Disseminated by ....., a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ....., a Communist organization."

Sec. 11 [790]. (a) Notwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.

* * * * *

Sec. 13 [792]. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such

organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

* * * * *

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; . . .

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Sec. 14 [793]: (a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its

recommendations, if any, with respect to action in the matter under consideration. . . .

* * * * *

Sec. 15 [784] (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement wilfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of sections 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

Sec. 16 [795]. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.